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September 23, 2010

VIA FEDERAL EXPRESS

Mr. Lester A. Heltzer, Esq. **Executive Secretary** National Labor Relations Board 1099 14th Street, N.W. Washington, D.C. 20570

Re:

New Country Audi, Inc. and International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 26

Case No. 34-CA-12563

Dear Mr. Heltzer:

Enclosed please find an original and seven (7) copies of the Employer's Amended Response to General Counsel's Motion for Summary Judgment and Notice to Show Cause Accompanying Memorandum in Support of Summary Judgment in the above-referenced matter.

Simultaneously, a copy of the Employer's Amended Response to General Counsel's Motion for Summary Judgment and Notice to Show Cause and Accompanying Memorandum in Support of Summary Judgment is being served on the Charging Party, and its listed representatives in this matter.

If you have any questions, please contact me.

Very truly yours,

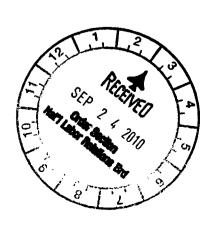
JACKSON LEWIS LLP

MRH/gmh Enclosures Michael R. Hekle

James D. Smith (Via Federal Express) cc:

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UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

	X
NEW COLNITON ALIDI INC	

NEW COUNTRY AUDI INC.,

CASE NO.: 34-CA-12563

-and-

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 26,

EMPLOYER'S AMENDED RESPONSE TO GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT AND NOTICE TO SHOW CAUSE AND ACCOMPANYING MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

On January 25, 2010 Counsel for the General Counsel filed a Motion For Summary Judgment and for Issuance of Board Decision and Order in the instant matter. On the same date, Counsel for the General Counsel also filed a Memorandum in Support of Motion for Summary Judgment for and Issuance of Board Decision and Order. On January 26, 2010, the National Labor Relations Board ("the Board") issued an Order Transferring Proceeding To The Board and Notice To Show Cause as to why the General Counsel's Motion should not be granted. General Counsel seeks a summary determination and award that New Country Audi, Inc. ("New Country" or the "Employer") violated Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act ("Act") by refusing to bargain with the Charging Party, the International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge 26.

On February 15, 2010, the Employer filed its initial response to General Counsel's summary judgment motion and memorandum of law in support that motion. On March 2, 2010, the Board, via its two sitting members at that time, issued a Decision and Order (355 NLRB No. 16). The Employer filed a Petition for Review, on March 12, 2010, with the Court of Appeals for District of Columbia Circuit ("Court of Appeals"). In response, on April 11, 2010, General Counsel for the Board filed a cross-application for enforcement of the NLRB Order.

The Court of Appeals initially held the matter in abeyance during the pendency of the New Process Steel LP v. NLRB case then before the Supreme Court of the United States. However, in mid-August 2010, following the Supreme Court's decision in New Process Steel LP v. NLRB, 130 S. Ct. 2635 (2010), holding the Board did not have proper quorum to issue decisions based on its statutory authority under Section 3(b) of the Act, General Counsel for the Board issued a Motion to Dismiss and accompanying NLRB Order setting aside the instant proceeding before the Court of Appeals, and the Board's initial decision (355 NLRB No. 16) in this matter. The Court of Appeals granted the Board's Motion. On August 24, 2010, via 355 NLRB No. 116, the Board issued a Decision, Certification of Representative and Notice to Show Cause compelling the instant Employer response.

The Employer hereby responds to General Counsel's Motion as follows:

- 1. On June 8, 2009, the International Association of Machinists & Aerospace Workers, District Lodge 26, AFL-CIO (hereinafter the "Union" or "IAM") filed a petition seeking to represent service technicians at New Country's service facility in Greenwich, Connecticut.
- 2. Pursuant to a Stipulated Election Agreement, approved by the Regional Director on June 19, 2009, a secret ballot election was conducted on July 17, 2009 at the Employer's facility. The results of the election were: thirteen (13) votes cast for Petitioner-Union; nine (9) votes cast against representation; and zero (0) challenged ballots. A margin of two votes determined the outcome of the election.
- 3. On July 24, 2009, the Employer timely filed Objections to the Conduct of the Election and to Conduct Affecting the Results of the Election. On July 31 and August 10 2009, consistent with Section 102.69 of the Board's Rules and Regulations and Acting Regional Director John Cotter's July 24 written request, the Employer filed detailed summaries of information

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outlining the factual basis for its Objections. The Employer asserted among other things that: i) Union portrayal of government bias, in favor of the IAM, unlawfully coerced eligible voters in the election; ii) the Union engaged in surveillance of employees during the election and reported material information to the Union's election observer during the polling period; and iii) the Union coerced eligible voters through threats of being stationed in the Employer's parking lot, in plain view of the polling area, during the July 17, 2009 election. On August 26, 2009, without the benefit of an evidentiary hearing, the Regional Director issued his Report on Objections recommending the Employer's Objections be overruled in their entirety.

- 4. On September 22, 2009, the Employer timely filed Exceptions to the Regional Director's Report on Objections ("Exceptions"). The Exceptions reiterated many of the Objections initially asserted by the Employer based upon unlawful coercive Union conduct prior to and during July 17, 2009 election. The Employer's Exceptions further contended that the Regional Director erred by failing to conduct a hearing in the instant.
- 5. On November 18, 2009, the Board, through its two sitting members (Chairman Liebman and Member Schaumber) at that time, issued its Decision and Certification of Representative adopting the Regional Director's findings and recommendations without reason or comment, except to remark in a footnote the *pro forma* adoption of the Regional Director's recommendation on an Objection the Employer did not maintain in its Exceptions. The Board also issued a Certification of Representative.
- 6. The Employer has maintained its position that the Union engaged in objectionable conduct preventing a free and fair election. Since on or about December 14, 2009, the Employer has refused to bargain with the Union, prompting the filing of the instant charge. Specifically, the Employer maintains that the Union was improperly certified because it engaged in objectionable conduct undermine the laboratory conditions required in a Board election.

- Further, the Board erred as a matter of law when it certified the Union as the 7. bargaining representative despite long-standing Board precedent and undisputed evidence of the Union's coercive solicitation of support in the Board election based upon government preference for the Union and unions in general. It is well established that employees with a 'reasonable impression' of Board biased and/or government support for a union, perpetuated by the petitioning union, are improperly coerced and such conduct unduly impacts the requisite laboratory conditions of the vote. Ryder Memorial Hospital, 351 NLRB 214 (2007); Sofitel San Francisco Bay, 343 NLRB 769 (2004). Additionally, the Union's blatant violation of the Milchem Rule demands, at a minimum, a hearing into the conduct surrounding IAM's electioneering. Any agent or representative engaged in material communications with or regarding voters around the polling area clearly compromises the integrity of the election. Parsec, Inc., 353 NLRB No. 96 (2009). Moreover, the Regional Director Report holds that "Employer's unsubstantiated contention that the conduct [electioneer and recordkeeping in the voting area] indicates the possibility of record keeping by the Union as to the employees' participation in the election is wholly speculative." See Regional Director's Report on Objections, p. 3 ¶ 2. As such, the Regional Director's Report identifies this potentially significant objectionable conduct but has failed to engage in any substantive investigation of the matter or remand for hearing. Finally, the Regional Director's failure to call for an evidentiary hearing regarding the disputed surveillance conduct of Union representatives further underscores the tenuous nature of his Report. McIndustries, Inc. 224 NLRB 1298, 1303 (1976) ("In order to fairly assess the question of surveillance it is necessary to consider the physical layout of the plant and the area of the plant where the voting took place").
- 8. On January 25, 2010, Counsel for the General Counsel filed a Memorandum in Support of Motion for Summary Judgment for and Issuance of Board Decision and Order. In it, Counsel for the General Counsel argues the Employer "seeks to re-litigate the issue of whether the

Union engaged in certain objectionable pre-election conduct which was fully resolved ..." The

Employer does not dispute the fact that the Regional Director, in his Report on Objections,

dismissed the Employer's arguments regarding government bias, Union electioneering and other

coercive Union conduct that improperly impact the results of the Board election. However, the

Employer argues that such determinations by the Regional Director were in clear error and contrary

to existing Board precedent or, at a minimum, required an evidentiary hearing. Similarly, the

Board's November 18, 2009 Decision and Certification of Representative failed to even address the

substantive issues raised by the Employer. Therefore, the government bias issue, along with the

Employer's other contentions, were never appropriately considered, investigated or adjudicated by

the Board, nor was any explanation offered by the Board for its departure from extant precedent.

9. For all the above reasons and the grounds set forth in the Employer's

Exceptions, the Employer is privileged to refrain from bargaining.

WHEREFORE, the Employer requests the General Counsel's pending Motion for

Summary Judgment be denied, that the Complaint that is the basis thereof be dismissed, and the

instant matter be dismissed. In the alternative, the Employer requests this matter be remanded for

hearing. The Employer further requests the Board grant such other relief it deems just and proper.

Respectfully submitted,

JACKSON LEWIS LLP

One North Broadway

White Plains, New York10601

(914) 328-0404

By:

Michael R. Hekle

Dated: September 23, 2010

White Plains, New York

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

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NEW COUNTRY AUDI INC.,

CASE NO.: 34-CA-12563

-and-

:

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 26,

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AFFIDAVIT OF SERVICE

I hereby certify that the foregoing Employer's Amended Response To General Counsel's Motion For Summary Judgment And Notice To Show Cause and Accompanying Memorandum In Support of Motion for Summary Judgment was served on the 23rd day of September 2010, upon the individuals named below, addressed as follows:

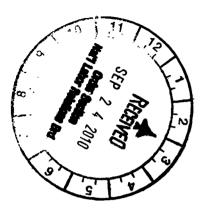
Jonathan B. Kreisberg Regional Director National Labor Relations Board, Region 34 280 Trumbull Street, 21st Floor Hartford, CT 06103 (via Federal Express)

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Michael R. Hekle

Dated: White Plains, New York September 23, 2010



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